Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1187 OF 2005

Maruti Tatya Kadam, Deceased,
Thru' Chandrakant M. Kadam ...Appellant
V/s.
Brahmadeo Mahadeo Mhaskar & Ors. ...Respondents

Mr.R.V. Govilkar, Advocate, for the Appellant.

CORAM : ABHAY S. OKA, J.

DATE : 23RD NOVEMBER, 2007.

P.C.:

1. Heard learned Advocate appearing for the appellant. The appellant is the original defendant in the Suit for perpetual injunction filed by the respondents-plaintiffs. The Suit for perpetual injunction filed by the respondents is on the title claimed by the respondents on the basis of Sale Deed executed on 7th June, 1985 in favour of the respondents by one Subhadrabai and one Satyabhamabai. The respondent-plaintiffs claimed to be in exclusive possession of the suit property and claimed title on the basis of the said Sale Deed.

2. In the written statement, the contention raised by the appellant i.e. the 1st defendant is

that he was having 1/4th undivided share in the suit property and the said Subhadrabai and Satyabhamabai being the legal representatives of his brother deceased Bhautatya were entitled to only 1/4th undivided share in the suit property. It was, therefore, submitted by the original 1st defendant that the respondents were not entitled to claim injunction against the co-sharer.

3. The Trial Court has decreed the Suit and the decree of the Trial Court has been confirmed in the Appeal preferred by the present appellant.

4. The submission of the learned Advocate for the appellant is that there was no declaration claimed in the Suit and suit simplicitor for perpetual injunction was not maintainable without claiming relief of declaration. He placed reliance on a decision of the Apex Court in the case of Vishwambhar & Ors. V/s. Laxminarayan (Dead) through LRs. & Anr. (2001) 6 SCC 163. He submitted that the finding regarding prior partition is not based on any legal evidence.

5. I have carefully considered the submissions. It is not in dispute that the vendors of the original plaintiffs are the legal representatives of the

deceased Bhautatya who was the real brother of the 1st defendant (predecessor of the appellant). The Trial Court has referred to decree passed in RCS No.238 of 1945 which was a Suit filed by the deceased Bhautatya against defendant No.1 in the present suit and other two brothers. The said decree records that deceased Bhautatya had 4/5th share and the 1st defendant in the present suit and his two brothers were having 1/5th share. The Trial Court has referred to a possession receipt evidencing that the decree for partition was executed and possession of 4/5th share in the land was handed over to deceased Bhautatya. The mutation entry referred to by the learned Advocate for the appellant appears to be the mutation entry based on decree for partition. On the basis of the said decree for partition, the Trial Court held that the vendors who were the heirs of the deceased Bhautatya were entitled to sell the suit property to the respondents (original plaintiffs). The finding regarding the prior partition has been affirmed by the Appellate Court on the basis of documentary evidence on record. Therefore, it cannot be said that the finding regarding partition is based only on mutation entries. In fact, the mutation entries have been effected on the basis of a decree for partition.

6. The Suit filed by the respondents (original plaintiffs) is for perpetual injunction on the basis of title. The decision of the Apex Court relied upon by the Advocate for the appellant will not have application to the facts of the present case as the plaintiffs in the said case before the Apex Court were required to pray for relief of setting aside the sale deed.

7. In the present case, as the suit for perpetual injunction is based on title, the Trial Court specifically framed issues regarding title and possession and a point for determination was also framed in that behalf by the Appellate Court.

8. There is no merit in the submissions made by the Advocate for the appellant. No substantial question of law arises. The Second Appeal is accordingly dismissed.

[ABHAY S. OKA, J.]